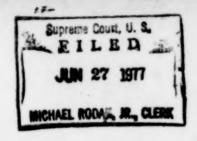
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IN THE

## SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 76-6769

LEROY BATES, Petitioner

v.

STATE OF OHIO, Respondent

PETITIONER'S REPLY TO REPLY BRIEF

OF RESPONDENT

RICHARD M. MOSK
MARILYN EPSTEIN LEVINE
1800 Century Park East
Los Angeles, California 90067

JACK GREENBERG

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ATTORNEYS FOR PETITIONER

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Petitioner Leroy Bates ("Bates") has set forth a correct statement of the facts (with citations to the record) and all of his legal positions in his Petition For Writ Of Certiorari.

Accordingly, for the most part, no rebuttal to the Reply Brief of Respondent in Opposition to Petition for Writ of Certiorari "Respondent's Brief") is necessary.

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Petitioner does, however, desire to comment on a few points raised in the Respondent's Brief. At pages 3, 4 and 10 of Respondent's Brief, respondent in effect implies that Bates knew that his alleged accomplice's (Ellis Shelton's) gun was loaded at the time of the robbery. Respondent points to the testimony of Connie Bates who testified that Ellis Shelton (the "triggerman") said in the presence of Bates that he, Shelton, had shells for the weapon and intended an armed robbery. She stated, however, that Bates told Shelton, "If you are going to pull an armed robbery . . . don't go in the bar with a loaded gun." She said she did not hear the full conversation (TP 219, 232). Thus she confirms, in effect, Bates' testimony that he insisted that no loaded weapon be utilized. Although Bates said that Shelton had shells for the weapon (as noted by the Respondent at p. 4), his observation of the shells constituted assurance that the weapon was unloaded (TP 290). Moreover, Bates testified that just before going in the bar he again sought confirmation that the weapon was unloaded (TP 290). There is no evidence contradicting Bates' testimony that he only agreed to participate in the robbery after he was assured that the weapon carried by Shelton would not be loaded (TP 287-290, 292). It should be recalled that Bates did not carry a weapon and killed no one.

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Respondent states that the three mitigating factors set forth in the Ohio statute "echo" the language found in the Model Penal Code and Florida statutes (Respondent's Brief, p. 15). Both the Model Penal Code (§ 210.6(4)) and the Florida statute, referred to in Proffitt v. Florida, 428 U.S. 242, 252 (1976), however, contain significantly more mitigating factors than provided by Ohio. Ohio's three limited "mitigating" factors do not comply with the requirements recently set forth in Roberts v. Louisiana, U.S. (June 6, 1977) in which this Court said "it is essential that the capital sentencing decision allow for consideration of whatever mitigating circumstances may be relevant to either the particular offender or the particular offense."

With respect to the admissibility of the confession, respondent, without citation, states that every time the rights were read to Bates he said he understood them (Respondent's Brief, p. 22). The transcript of the pretrial hearing on the motion to suppress does not contain any indication that Bates stated he understood his rights. (See TM Bates 27-28, 45-48, Drescher 134, Burgess 169, 197; State v. Bates, 48 Ohio St. 2d 315, 358 N.E.2d 584, 587-588 (1976)).

For the reasons set forth in the Petition For Writ Of Certiorari, petitioner urges the Court to grant the writ to

Dated: June 23, 1977 Respectfully submitted, RICHARD M. MOSK MARILYN EPSTEIN LEVINE 1800 Century Park East Los Angeles, California 90067 JACK GREENBERG JAMES M. NABRIT, III PEGGY C. DAVIS JOEL BERGER DAVID E. KENDALL 10 Columbus Circle, Suite 2030 New York, New York 10019 ANTHONY G. AMSTERDAM Stanford University Law School Stanford, California 94305 ATTORNEYS FOR PETITIONER 

consider the issues set forth therein.

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CERTIFICATE OF SERVICE

RICHARD M. MOSK, a member of the Bar of this Court, certifies that pursuant to Rule 33 he served the within Petitioner's Reply to Reply Brief of Respondent on the counsel for respondent by enclosing a copy thereof in an envelope, airmail postage prepaid addressed to:

Simon L. Leis, Jr.

Leonard Kirschner

Robert R. Hastings, Jr.

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and depositing same in the United States mails at Los Angeles, California, on June 23, 1977, and further certifies that all parties required to be served have been served.

Counsel for Petitioner